

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1335

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* RECORDS ROOM *

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 77-1335

To be argued by
Kevin Ross

UNITED STATES OF AMERICA,

Appellee,

-against-

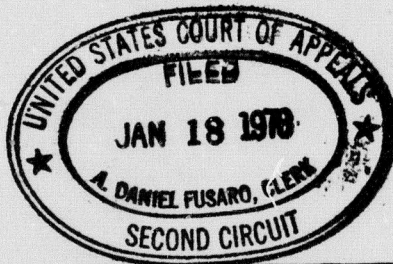
VINCENT FRANK SANTA,

Appellant.

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P/S

On Appeal From the United States District
Court for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1335

UNITED STATES OF AMERICA,

Appellee,

-against-

VINCENT FRANK SANTA,

Appellant.

BRIEF FOR THE APPELLANT

Preliminary Statement

VINCENT FRANK SANTA appeals from a judgment of conviction entered on July 15, 1977 in the United States District Court for the Eastern District of New York, by Honorable Jacob Mishler, United States District Judge, after a jury trial.

The original indictment, 75 C.R. 762, charged Mr. Santa and co-defendants Gomez, Diamond, Maloney, Kahan, and the Wercbergers with possession of goods stolen from Interstate Commerce (T. 18 U.S.C. 659) and conspiracy (T. 18 U.S.C. 371). Co-defendants Diamond and Maloney were severed and pleaded guilty. Kahan and the Wercbergers were severed and convicted

on the possession count after a jury trial.

By superseding indictment, 77 C.R. 33, defendants Santa and Gomez were joined with co-defendants Savino, DeLuca, and the two DeFellipo's. All were convicted. On July 15th, 1977, Mr. Santa was sentenced to the custody of the Attorney General for a term of ten years, which term is to run consecutively to a current term of imprisonment of ten years imposed in the District of New Jersey on September 14, 1976, upon conviction on the same violations. Appellant's Notice of Appeal was filed July 15th, 1977. He is incarcerated.

QUESTIONS PRESENTED

1. Does the conviction in the Court below for conspiracy to possess goods stolen from interstate commerce constitute double jeopardy?

2. Was it error for the Court below to deny the defendant's Motion to Suppress?

STATEMENT OF FACTS

On September 14, 1976, Vincent Frank Santa was convicted in the United States District Court for the District of New Jersey on an indictment, 75 C.R. 408, charging possession of goods stolen

from interstate commerce, in violation of T. 18 U.S.C. 659 (one count) and conspiracy to commit that offense, in violation of T. 18 U.S.C. 371 (one count). The conviction involved the theft of a truckload of Yves St. Laurent suits on November 26, 1974. Convicted with him were co-defendants Joseph DeLuca, James and Pasquale DeFellipo, Stanley Diamond, and Morris Spiers (Tr. 5/23/77). All but Spiers were also convicted in the presents case. Santa and DeLuca were arrested by Customs Agent Robert Snyder, who observed them in possession of the suits, upon execution of a search warrant in Matawan, New Jersey on December 2, 1974 (Tr. 5/23/77, pp. 882-909). Instrumental in their conviction was the testimony of one Thomas Cogar, who acted as a Government informant while posing as a member of the conspiracy (Tr. 5/19/77, pp. 672-705).

The present case involves the theft of a truckload of Shick Razor products in Brooklyn on March 11th, 1975. Acting again on information supplied by Mr. Cogar, as well as another informant, Paul Pollari, Federal Agents secured a search warrant for the premises known as CBS Warehouse in Brooklyn, operated by severed co-defendants Kahan and the Wercbergers. The affidavit made in support of the warrant by F.B.I. Agent Patrick F. Colgan stated that he had reason to believe that the stolen Schick razor products were concealed in the CBS warehouse.

The grounds stated for such belief were (1) a report that a trailer carrying Schick razor products from Connecticut to California was hijacked on March 11, 1975.

(2) A report from a reliable informant that the informant observed a large number of Schick razor cartons at the CBS warehouse on March 12, 1975 (A-6).

On the basis of this affidavit, the warrant was issued. Upon its execution, a large number of cartons of Schick razor blades were seized and identified as those stolen (Tr. 5/18/77, p. 466).

By Notice of Motion dated March 5, 1976 then co-defendants Kahan and the Wercebergers moved to suppress the fruits of the search by Notice of Motion of the same date, Vincent Santa also moved to suppress. The motion was denied and a Memorandum Decision filed (A-10). Kahan and the Wercebergers were severed, tried, and convicted on the possession count.

By Superseding Indictment, 77 C.R. 33, defendants Santa and Gomez were joined with co-defendants DeLuca, Savino, James and Pasquale DeFellipo.

THE GOVERNMENT'S CASE

For the purpose of this Appeal, the testimony of certain witnesses is salient.

Paul Pollari testified that he acted as a Government informant while posing as a member of the conspiracy. He testified to the manner in which the stolen goods were unloaded, concealed, and transported to the "F & S" and "CBS" warehouses. He testified to the acts of Santa, DeLuca, and Gomez in this regard (Tr. 5/17/77, pp. 127-218). In particular, Mr. Pollari testified to an admission by Mr. Santa. Pollari said that he heard Santa discuss the recovery of the shipment by the authorities and the division of the proceeds from it:

"I heard Jimmy say to Tommy that, 'We already got 20,000 from them and we ought to get 20,000 because it was probably their fault.'" (Tr. 5/17/77, p. 216)

F.B.I. Agents Dowd and Peccuraro testified that they conducted a surveillance of the CBS warehouse on March 13, 1975 and that they observed the defendants Gomez and DeFellipo loading and unloading the Schick merchandise. A search warrant was secured, and the Schick products seized (Tr. 5/18/77, pp. 449-497; Tr. 5/18/77, pp. 542-570; Tr. 5/19/77, pp. 613-616).

Thomas Cogar then testified. Mr. Cogar acted as a Government informant within the group known as the "Robert's Lounge" group from July of 1974 through May 30, 1975 (Tr. 5/19/77, p. 672). As was noted in the Government's Summation, he was the Government's ears within the conspiratorial group and was instrumental in the conviction of defendants Santa, DeLuca and DeFellipo in the

District of New Jersey on the charges of conspiracy and possession of Yves St. Laurent suits stolen from interstate commerce (Tr. 5/24/77, pp. 1100-1104).

Cogar testified that the group frequented the dress shop owned by his father-in-law of Leffert's Boulevard. Particularly of note was an admission by defendant Santa to which Cogar testified. He said that on February 12, 1975, one month before the date of the crimes charged, he heard Mr. Santa tell him and defendant James DeFellipo that they were not to unload a truck which had just been seized because there was a leak in the group. Mr. Santa, he said, was referring to the recovery of the Yves St. Laurent suits by Federal Agents in New Jersey (Tr. 5/19/77, pp. 700-705).

Customs Agent Robert Snyder then testified to the events underlying the conviction of the defendants in the District of New Jersey. He said that on December 2, 1974 he conducted a surveillance of a warehouse in Matawan, New Jersey, and there observed defendants Santa and DeLuca in possession of stolen Yves St. Laurent suits along with informant Thomas Cogar and another. A search warrant for the premises was then executed, the suits seized and Santa and DeLuca arrested. The brothers Fellipo were later arrested on the same charges of conspiracy and possession of property stolen from interstate commerce.

Certificates of conviction in the District of New Jersey on those charges were introduced in evidence against defendants Santa, De Luca, and the DeFellippos, as evidence of a prior similar act showing a common scheme or plan (Tr. 5/23/77, pp. 882-909).

At the close of the Government's case, a judgment of acquittal was entered as to the defendant John Savino (Tr. 5/23/77, p. 927). The jury returned verdicts of guilty on both counts as to the defendants Santa, DeLuca, Gomez, and the DeFellipo's.

POINT ONE

THE DOUBLE JEOPARDY ISSUE
SHOULD BE NOTICED BY THIS
COURT AS "PLAIN ERROR"

Federal Rule of Criminal Procedure 52(B) provides

"Plain Error. Plain Errors or Defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

The issue to be raised is one of Double Jeopardy in violation of the Fifth Amendment which provides in Part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Appellant is aware of those cases holding that double jeopardy is an affirmative defense which may be waived by failure to raise it at the trial level. United States v. Buonomo, 441 F.2 922 (7th Cir. 1971). The issue was not raised in the Court

below. However, the Court is respectfully reminded of its statement in United States v. Vaughn, 443 F.2 92 at 94 (2nd Cir. 1971):

"It is not a miscarriage of justice to convict a guilty man, but if he is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, then the Court should invoke the plain error rule in order to protect their own public reputation."

Surely, Double Jeopardy is a violation of a substantial right. Although this Court is not obliged to do so, it is respectfully requested that this Court consider the issue of Double Jeopardy. United States v. Buonomo, supra, at 925 (7th Cir. 1971).

POINT TWO

THE CONVICTION ON THE CHARGE
OF CONSPIRACY TO POSSESS STOLEN
GOODS CONSTITUTED DOUBLE JEOPARDY
WHERE THERE WAS A PRIOR CONVICTION
ON THE SAME CHARGE ALTHOUGH THE
GOODS WERE DIFFERENT. THE EVIDENCE
SHOWED ONE CONTINUING CONSPIRACY
INVOLVING THE POSSESSION OF VARIOUS
STOLEN GOODS.

Appellant Vincent Santa contends that he has been convicted twice on the same offense. His conviction in the District of New Jersey on the charge on conspiracy to possess goods stolen from interstate commerce is identical to his conviction on the same charge in the Court below, although the goods in each case were different. Suits were involved in the first, and Schick

razor products in the second.

The New Jersey indictment charged the Appellant with violation of T. 18 U.S.C. 659 and with conspiracy to violate that section. Also indicted were codefendants Morris Spiers, Stanley Diamond, Joseph DeLuca, Pasquale DeFellipo and James DeFellipo, and Michael Scarano. Diamond, Santa, DeLuca, and the DeFellipo's were indicted in the present case on the same charges. The overt acts charged by the New Jersey Indictment were as follows:

"OVERT ACTS: In furtherance of the conspiracy and to effect the objects thereof, the defendants and co-conspirators, in the District of New Jersey, committed and caused to be committed the following:

"1. in or about the month of October, 1974, MICHAEL SCARANO subleased warehouse space at 100 Church Street, Matawan, New Jersey, to VINCENT SANTA, a/k/a 'Jimmy Santa'; MORRIS SPIERS, a/k/a 'Garlic Mike', and STANLEY DIAMOND.

"2. On or about November 26, 1974, VINCENT FRANK SANTA, a/k/a 'Jimmy Santa'; MORRIS SPIERS, a/k/a 'Garlic Mike'; JOSEPH DE LUCA; PASQUALE DE FELLIPO, a/k/a 'Patty'; JAMES DE FELLIPO, a/k/a 'Jimmy', and MICHAEL SCARANO met at the warehouse facility at 100 Church Street, Dock 7, Matawan, New Jersey.

"3. On or about November 26, 1974, STANLEY DIAMOND arrived at a warehouse facility at 100 Church Street, Matawan, New Jersey, driving an Air-Freight Transportation, Inc. Truck and there met with VINCENT FRANK SANTA, a/k/a 'Jimmy Santa'; MORRIS SPIERS, a/k/a 'Garlic Mike'; JOSEPH DELUCA; PASQUALE DE FELLIPO, a/k/a 'Patty'; JAMES DE FELLIPO, a/k/a 'Jimmy'; and MICHAEL SCARANO and participated in unloading, inventorying, and

storing goods and merchandise contained in the truck driven by STANLEY DIAMOND.

"4. On or about December 2, 1974, JOSEPH DELUCA went to 100 Church Street, Matawan, New Jersey.

"5. On or about December 2, 1974, VINCENT FRANK SANTA, a/k/a 'Jimmy Santa'; and MICHAEL SCARANO loaded a quantity of stolen goods and merchandise at 100 Church Street, Matawan, New Jersey, into a rented U-Haul van.

"In violation of Title 18, United States Code, Section 371."

In the New Jersey case, Santa was arrested in possession of stolen property by Customs Agent Robert Snyder. Also arrested at the same time were Joseph DeLuca (co-defendant in both cases with Santa and his son-in-law) as well as Government informant Thomas Cogar. Mr. Cogar was the Government's eyes and ears with the conspiratorial group known as the "Robert's Lounge" group to which Santa, DeLuca, Diamond and the DeFellipo's belonged (Tr. 5/19/77, p. 672; Tr. 5/24/77, pp. 1100-1104).

Cogar and Agent Snyder testified in both cases. In the Court below, Cogar testified to the day to day operation of the conspiracy, as did informant Paul Pollari. Snyder testified in the Court below to the events surrounding his arrest of Santa, DeLuca, and Cogar in New Jersey and their possession of stolen suits. Certificates of conviction on the New Jersey case were introduced in evidence in the Court below against defendants Santa, DeLuca and the DeFellipo's (Tr. 5/23/77, pp. 882-909).

There can be little doubt that the conspiracy to possess stolen goods in New Jersey and the conspiracy to possess stolen goods in the Eastern District of New York were the same, on-going conspiracy, albeit the goods in each case were different.

The indictments reveal that five co-defendants were indicted in both: Santa, DeLuca, the DeFellipo's and Diamond, indicating a central core of the conspiracy. An inspection of the New Jersey indictment reveals that the modus operandi in that case was the same as in the Court below, as was there revealed by the testimony of informant Paul Pollari (Tr. 5/17/77, pp. 127-218). The stolen goods were unloaded from their truck and taken to a "rented drop", the goods being transported by rental trucks.

The testimony of Michael Cogar, the Government's eyes and ears within the conspiracy reveals conclusively the existence of one continuing conspiracy. He served as an informant within the "Robert's Lounge" group from July of 1974 through May 30, 1975 (Tr. 5/19/77, p. 672). A span of time encompassing both the incidents involving the suits in New Jersey and the razor blades in Brooklyn, Cogar testified that the group frequented three places: his father-in-law's dress shop, the house of one Thomas DeCandia, and Robert's Lounge. All of which were within a block and a half of each other. One bit of testimony in particular reveals the cohesiveness and continuity of the conspiracy.

Cogar testified that on February 12, 1975, one month before the theft of the Schick razor products, he and James De Fillipo were told to wait at the dress shop, because a truck had been taken which needed to be unloaded. Cogar said that the Appellant later told him that he would not be needed. The crew used to unload the truck in New Jersey was not to be used. The arrest of the defendants in New Jersey and the recovery of the stolen suits revealed a leak in the group (Tr. 5/19/77, pp. 700-705).

The existence of one continuing conspiracy is further shown by the basis upon which the testimony of Agent Snyder and the New Jersey convictions were admitted in evidence in the court below. They were admitted as evidence of prior similar acts showing a common scheme or plan. So much evidence of the New Jersey case was admitted that it would not be exaggeration to say that the same evidence was utilized in both trials to show the existence of the conspiracy.

Such an analysis of the evidence might not satisfy the traditional "same offense" test which provides that offenses are the "same" for the purposes of Double Jeopardy when the evidence required to convict on one would have been sufficient to convict on the other. United States v. Kramer, 289 F.2d 909 (2nd Cir. 1961).

However, as was said by this Court in United States v. Mallah, 503 F.2d 971 (2nd Cir. 1974) with regard to a narcotics conspiracy:

"This same evidence test is difficult to apply in determining whether one criminal conspiracy is the same as a second criminal conspiracy. The essence of the charge is the criminal agreement to merchandise narcotics. The same agreement may be established by different aggregations of proof. Appellant is hard pressed to show that he could have been convicted under the indictment below on the basis of the evidence introduced in Pacelli I, when the overt acts specified in Pacelli I were distinct from the overt acts charged below. But because there are no doubt many overt acts which the government might have charged, a test measuring only overt acts provides no protection against carving one larger conspiracy into smaller separate agreements. In part for this reason, courts have been wary of applying a strict same evidence test in the context of criminal conspiracy." United States v. Mallah, supra, 503 F.2 at 985.

In the present case, the evidence, although not exactly the same in both cases, shows the existence of one conspiratorial group whose continuous end was the possession of various hijacked goods. The conspiracy was "carved into smaller, separate agreements" because it extended into more than one hijacked truck.

As was said by the Seventh Circuit in United States v. Palermo, 410 F.2d at 470 (7th Cir. 1969):

"The government is not free to arbitrarily decide whether there is one agreement or several. If the agreement

"... contemplates the bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such a continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one."

United States v. Kissel, 218 U.S. 601, 607, 31 S.Ct. 124, 54 L.Ed. 1168 (1910). To convict a party severally for being part of two conspiracies when in reality he is only involved in one overall conspiracy would be convicting him of the same crime twice.
Short v. United States, 91 F.2d 614 (4th Cir. 1937);
United States v. American Honda Motor Company, 271 F.Supp. 979 (N.D. Cal. 1967)."

In conclusion, the conspiracy conviction of the Appellant should be reversed as violative of the Fifth Amendment prohibition against Double Jeopardy.

POINT THREE

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FAILS TO MAKE OUT PROBABLE CAUSE TO BELIEVE THAT THE PROBABLE CAUSE TO BELIEVE THAT THE PROPERTY OBSERVED IN THE PREMISES TO BE SEARCHED WAS THE PROPERTY ALLEGED TO HAVE BEEN STOLEN.

By Notice of Motion dated March 3, 1976 (A-8), Appellant Santa moved to suppress the evidence seized in the search of the

CBS warehouse pursuant to a warrant issued upon the affidavit of Special Agent Patrick Colgan (A-6). The grounds of the Motion were that the affidavit in support of the Motion failed to make out probable cause. Later severed co-defendants Kahan and the Wercbergers also moved to suppress on the same grounds. The Court below denied their Motion, filing an Opinion and Order. (A-10)

The Appellant's Motion was denied orally by the Court below on the eve of the trial. In doing so, the Court referred to its Decision in the Wercberger case (Tr. 5/16/77, pp. 22-43).

The facts set out in the Affidavit as tending to establish grounds for the issuance of the warrant are described as originating from two sources (A-10).

A communication was received by an unnamed agent of the F.B.I. from a Mr. James Lester, an employee of Time-D.C. Trucking Corp. of Secaucus, New Jersey, to the effect that a trailer owned and operated by that firm was hijacked on March 11, 1975 at an unstated location while en route from West Haven, Connecticut to Anaheim, California. Mr. Lester further advised that the trailer contained 6910 cartons of Schick razors and toilet products.

The second source of information set out was an informant alleged to be reliable. His information was that on March 12, 1975, he saw at a certain CBS warehouse, several thousand

cartons of Schick Super-Two Bonded Razors.

These facts show:

1. Somewhere between Connecticut and California, a trailer containing a large quantity of Schick razors and toilet products was hijacked.

2. On March 12, 1975, the CBS warehouse, located in Brooklyn, New York, contained a large quantity of Schick razors.

The Court below held that these bare facts were sufficient to constitute probable cause, in that the affidavit showed that the number of Schick products contained in the CBS warehouse was extraordinary (A-12).

Appellant contends that a man of reasonable caution could not infer from these facts that the cartons of Schick razors seen at the CBS warehouse were those stolen.

In U.S. v. Roth, 391 F.2d 507 (7th Cir. 1967), the Court was confronted with a problem similar to that posed by the present warrant and affidavit although also involving other issues.

The affidavit in support of the search warrant in Roth, supra, contained allegations that a certain truck's cargo of Hamilton Beach blenders had been hijacked. The affidavit stated that an informant known to be reliable said that the stolen blenders were in a certain warehouse. The affidavit further

stated that a fellow agent of the affiant had seen, in the warehouse, a large number of "Hamilton Beach" boxes.

The affidavit was held to be insufficient on several grounds. No underlying circumstances were shown for the source of the informant's knowledge. This being the case, the question arose whether or not the observation of the affiant's fellow officer, one Noonan, was sufficient to make out probable cause.

The Court held that no probable cause was made out. No connection was shown between the stolen cargo, Hamilton Beach Blenders, and the contents of the warehouse to be searched by the agent's observation of a large number of "Hamilton Beach" boxes in the warehouse. The court said that the agent's statement:

"Might have described any of a large number of warehouses that had received a shipment of Hamilton Beach products prior to or contemporaneously with the theft of the blenders in question. The statement therefore is too imprecise to establish probable cause that what Noonan (the agent) observed on the premises was the stolen blenders."
U.S. v. Roth, 391 F.2d at 511 (7th Cir. 1967).

Appellant contends that the Roth case is similar to the present situation. An allegation that warehouse contains boxes of products containing the same brand name as products alleged to be stolen does not make out probable cause to believe that the warehouse contains the stolen products.

The case of U.S. v. Wood, 270 F. Supp. 966 (S.D.N.Y. 1967) is of interest in considering the issue raised.

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An affidavit in support of a search warrant in Wood, supra, stated that a load of Underwood Olivetti typewriters had been stolen, and that an informant had seen, in the premises to be searched, Olivetti-Underwood typewriters, one of which bore the serial number 054569, which number was known to the affiant as belonging to one of the stolen typewriters.

The issue was raised whether it was necessary to establish the reliability of the informant. The court held it was not necessary.

"In the case at bar, the serial number supplied by Holt (the informant) which matched the number known by the F.B.I. agent was strong evidence of credibility."
U.S. v. Wood, supra, 270 F. Supp. 966 at 967, N.5.

With respect to probable cause, the court said:

"When the number given by Holt (informant) corresponded to that of one of the stolen typewriters, there was probable cause for the issuance of the warrant." 270 F.Supp. at 967.

The quoted material begs the following question: Where the only connection between allegedly stolen articles and allegedly observed articles is that they are of the same nature and brand, shouldn't a greater connection be required before probable cause arises? The answer, implicit in the quoted material would seem to be: yes.

Turning to the present case, an examination of the affidavit reveals that a number was observed on Schick cartons in the CBS

warehouse (A-7). This number, however, was found to not be a serial or identification number (A-11). Thus, the warrant and affidavit describe characteristics common to probably hundreds of thousands of Schick cartons in the greater New York area alone: they describe the goods as cartons, containing razors, bearing the brand-name Schick, and a "Spec. No."

Consequently, statements in the affidavit are too imprecise to establish probable cause.

Furthermore, additional information which may connect, to a satisfactory degree, the stolen articles with the observed articles, may not be considered in determining the warrant's validity, where such information is not gleaned from the four-corners of the search warrant affidavit. U.S. v. Birrell, 242 F.Supp. 201 (S.D.N.Y.). Therefore, the warrant must fail.

The case U.S. v. Viggiano, 433 F.2 716 (2nd Cir. 1970) is not inapposite to Appellant's position. In that case the affidavit stated that an informant had observed cartons of "Russ Togs" at the premises to be searched. Myriad facts set out in the affidavit tended to connect the observed cartons with cartons of "Russ Togs" known to be stolen. The cartons were described as bearing tags for out-of-state shipment, as did the stolen cartons. The affidavit stated that the defendant had told the informant that he had received the cartons on certain dates, which dates conformed to the dates on which similar goods were stolen. Moreover, the

affidavit stated that the defendant offered to sell the observed articles to the informant at a price which was consistent with the value of the articles stolen. The greatest distinction between Viggiano, supra, and the present case is that the affidavit in Viggiano stated that the articles believed to be stolen were observed to be stored in a residence, and not a warehouse. All in all, the great detail of the affidavit painted the picture of the operations of a "fence". The present affidavit is devoid of detail and does not allow a reasonable, cautious man to draw any conclusion.

Also distinguishable is the case of Rugendorf v. U.S., 376 U.S. 528, 84 S.Ct. 825 (1964). In that case the affidavit in support of the search warrant stated that certain types of furs had been stolen -- approximately seventy-five to eighty -- fur pieces, comprised of mink, otter and beaver stoles and jackets. The affidavit also stated that an informant had seen seventy-five to eighty mink, otter and beaver stoles and jackets, with their labels removed, in the defendant's basement. The affidavit further stated that the informant had told the affiant that he had been told that the furs were stolen. The informant's information that the observed fur pieces were stolen was corroborated by information from other informants. In short, the affidavit set out facts as grounds for belief that the observed fur pieces were the proceeds of a theft.

The present affidavit is devoid of any fact tending to establish a connection between observed products and those allegedly stolen. Nothing is shown which even indicates that the observed products were in any sort of suspicious condition, i.e., there is no statement that tags were missing, serial numbers obscured, or any other allegation giving reason to believe that the observed Schick products were anything more than Schick products stored in a warehouse.

In conclusion, the statements contained in the present search warrant affidavit are too imprecise to establish probable cause that what the affidavit's confidential informant observed in the CBS warehouse was the allegedly stolen Schick products. U.S. v. Roth, 391 F.2d 507 (7th Cir. 1967). U.S. v. Wood, 270 F.Supp. 966 (S.D.N.Y. 1967).

POINT FOUR

THE APPELLANT HAS STANDING

One of the grounds upon which the Court denied the Motion to Suppress was that the Appellant lacked standing (Tr. 5/16/77, pp. 24-43).

The Appellant contends that he has standing under the Automatic Standing Rule as set down by the United States Supreme Court in Jones v. United States, 80 S.Ct. 725, 362 U.S. 257, 4

L.Ed.2 897 (1960), in that he was charged with a crime, one element of which is possessory (A-4).

Furthermore, Appellant contends that he had a possessory interest in the goods seized on March 12th, which was sufficient to create standing.

Overt Act No. 2 of Count Two of the Indictment, the Conspiracy Count, alleges:

"2. On March 12, 1975, the defendants VINCENT JAMES SANTA, a/k/a 'Jimmy Santa', JOHN SAVINO, JOSEPH DELUCA, JAMES DEFILLIPO, PATRICK DEFILLIPO, a/k/a 'Paddy DeFillipo' and MANUEL GOMEZ, did have in their possession approximately six thousand nine hundred and ten (6,910) cartons of Schick Shaving Products which they placed in CBS and S & F Warehouses in Brooklyn, New York."
(A-5)

Moreover, Paul Pollari testified to an admission on the part of the Appellant Santa, evidencing a proprietary interest in the property seized. He said that he heard the Appellant say that he was owed money for the property seized (Tr. 5/17/77, p. 216).

CONCLUSION

THE CONVICTION FOR CONSPIRACY SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED ON THE GROUND OF
DOUBLE JEOPARDY

THE ORDER DENYING THE DEFENDANT'S MOTION TO
SUPPRESS SHOULD BE REVERSED AND A NEW TRIAL
ORDERED

Dated: October 3, 1977

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-1335

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UNITED STATES OF AMERICA,

Appellee,

AFFIDAVIT OF SERVICE

-against-

VINCENT FRANK SANTA,

Appellant

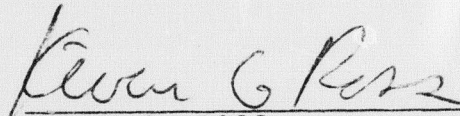
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STATE OF NEW YORK)

ss.:

COUNTY OF QUEENS)

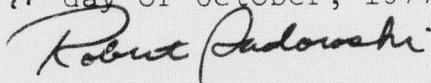
KEVIN G. ROSS, being duly sworn, deposes and says: that
on October 11, 1977, I personally served upon DAVID TRAGER, U. S.
Attorney for the Eastern District of New York, ^{one copy} ~~three (3) copies~~
^{and Appendix}
of the Appellant's brief in the above-entitled appeal by delivering
the same to his office located at 225 Cadman Plaza East, Brooklyn,
New York.



KEVIN G. ROSS

Sworn to before me this

11th day of October, 1977.



ROBERT A. SADOWSKI
NOTARY PUBLIC, State of New York
No. 41-5424975
Qualified in Queens County
Term Expires March 30, 1979

